

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

75-7076

In The UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 75-7076



THE ROBERT STIGWOOD GROUP LIMITED,
LEEDS MUSIC LIMITED and LEEDS MUSIC CORPORATION,
Plaintiffs-Appellants-Cross-Appellees,

v.

JOHN T. O'REILLY, JACK COYNE and ROBERT CASSIDY,
Defendants-Appellees-Cross-Appellants.

Docket No. 75-7077

TRACK MUSIC, INC., FABULOUS MUSIC LTD.
and NEW IKON, LTD.,
Plaintiffs-Appellants-Cross-Appellees,

v.

CONTEMPORARY MISSION, INC., JOHN T. O'REILLY,
JACK COYNE, PATRICK BERKERY and RICHARD PALMESE,
Defendants-Appellees-Cross-Appellants.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

DEFENDANTS-APPELLEES-CROSS-APPELLANTS' BRIEFS

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DEFENDANTS-APPELLEES' REPLY BRIEF

DEFENDANTS' STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Does the general rule that United States copyright law has no extraterritorial effect apply when dramatico-musical performances which were given in Canada are alleged to infringe United States copyrights because the performers assembled in the United States?

2. In cases involving an award of statutory damages under Section 101(b) of the Copyright Act (17 U.S.C. § 101(b)) are courts compelled, simply because multiple infringements are involved, to mechanically award more than they determine to be reasonable or just?

DEFENDANTS' PRELIMINARY STATEMENT

The consolidated appeals are from two amended final judgments entered in the United States District Court for the District of Connecticut, pursuant to rulings of the Honorable Robert C. Zampano. Defendants-Appellees-Cross Appellants [hereinafter, "Defendants"] appeal from so much of the decision of the court below which granted damages for the rendition of each separately copyrighted portion of a composite dramatico-musical work. One case involves the rock opera "Jesus Christ Superstar [hereinafter, "Superstar"] and the other concerns the rock opera, "Tommy." Defendants contend that the court below should have based its damage award on the unauthorized use of an "overall" copyright covering the performances of each rock opera as

a dramatico-musical entity, but should not have multiplied damages because of the unavoidable use of individually copyrighted song portions (which essentially duplicate the coverage of the overall copyright in each of the operas) during the course of performances of the respective rock operas as a whole.

DEFENDANTS' STATEMENT OF THE CASES

SUPERSTAR ACTION

Defendants are individual priests of a pious society in the Roman Catholic Church, called the Contemporary Mission. Plaintiffs sued defendants for infringement by unauthorized public performance of a dramatico-musical work entitled "Jesus Christ Superstar."

In the Superstar Action, contrary to the gross misrepresentations of plaintiffs' counsel to the effect that defendants were posing as priests and as a religious community and that they were a fly-by-night group, the court below determined that defendants

"are sincere and dedicated men who, through their 'musical ministry,' have performed innumerable acts of charity, aided the poor and disadvantaged, and attempted to influence the lives of youngsters, Catholic and non-Catholic." 346 F. Supp. at 379.

Noting that defendants as seminarians had served and lived in St. Louis ghettos, the court observed:

"Touched by the deep suffering and misery they witnessed, and recognizing the importance of music as a vehicle to impress the young, the defendants conceived the idea of musical preaching by using modern music to convey the messages of the Gospels."
Id.

It was in this light that defendants conceived the idea of presenting the rock opera JESUS CHRIST SUPERSTAR in such a manner as to celebrate the divinity of Christ, rather than to demean it as did many, including plaintiffs, who presented Superstar at the time.

Although defendants claimed, among other defenses, a religious statutory exemption as an affirmative defense to the claim of unauthorized performances (App., 13), the lower court determined that they should be enjoined from further performances of Superstar. 346 F. Supp. at 385. The holding was affirmed by this Court (App., 24).

Plaintiffs thereafter moved for summary judgment granting a permanent injunction and statutory damages in the amount of \$90,000.00 for an alleged sixty (60) performances of the rock opera, Superstar. Plaintiffs thus demanded damages of a whopping \$1,500.00 per performance of Superstar, even though no attempt was made to prove defendants' profits or plaintiffs' damages, plaintiffs instead relying solely on the statutory damage provision of the Copyright Act, 17 U.S.C. § 101(b) (1970) (App., 20). Plaintiffs

claimed six substantially identical copyrights in the unified entity, Superstar; namely, three (3) separate copyrights for three (3) individual song portions within the rock opera, and one copyright for the libretto, one for the vocal score, and an overall copyright for "musical excerpts/complete libretto" (App., 6). Plaintiffs sought the statutory minimum award [\$250.00] multiplied by the six copyrights (five of which provided duplicate coverage), multiplied by the alleged sixty (60) performances. Defendants did not and do not concede that the number chosen by plaintiffs as the number of alleged unauthorized performances represents accurately or correctly the number of performances, if any, for which defendants may be held liable. Plaintiffs also demanded \$30,000.00 in attorney's fees, thus demanding a total of \$120,000.00.

On pages 10 and 12 of their brief, plaintiffs have stated that

"gross ticket sales for performances subsequent to December 1, 1971 amounted to approximately \$300,000, and the amount therefrom received by the Contemporary Mission was approximately \$220,000, and that defendants paid out for expenses approximately \$33,000, leaving a net balance to defendants in excess of \$185,000."

From the foregoing plaintiffs appear to imply that defendants made a profit ("net balance") of \$185,000.00 from the Superstar performances. On page 33 of their brief,

plaintiffs seem to back off a bit, stating ". . . in excess of \$100,000 after expenses went directly into defendants' coffers." If this is so, why did plaintiffs choose to demand "in lieu" statutory damages rather than proving "damages and profits" under 17 U.S.C. 101(b) (1970) [reproduced in its entirety as "Appendix A" hereto]? After all, plaintiffs would have only to prove sales (which were stipulated to be \$300,000.00) and defendant would be required to prove "every element of cost which he claims" Id.

Defendants contend that plaintiffs wanted no part of a trial to ascertain damages and profits because they knew that defendants would be able to establish that their real profits were nowhere near the levels previously stated by plaintiffs. They also wanted to deny defendants the opportunity to establish that plaintiffs through their counsel had not acted with "clean hands" during the proceedings in the court below.

In his testimony at the preliminary hearing, Father O'Reilly made an approximation of gross receipts from the Superstar tour. Father O'Reilly has never been and is not now an accountant or bookkeeper for himself or for the Contemporary Mission. As mentioned above, plaintiffs repeatedly indicated the amount stipulated by Father O'Reilly in the preliminary hearing, but failed to mention that Father O'Reilly was merely approximating on the basis of his non-

professional knowledge. He said, when asked as to the amount received by Contemporary Mission, "I would say" (App., 18). Beyond this approximation offered by Father O'Reilly, no formal proof was offered by plaintiffs, nor did defendants have the opportunity to offer such proof, as to the "profits"--if any--received by the defendants. In actuality plaintiffs' constant reference to the approximation offered by Father O'Reilly as an indication of the profits received by defendants is doubly invidious. Plaintiffs are not seeking to prove profits and damages, but instead demand minimum statutory damages. Yet they have multiplied unconscionably their damages and have attempted to justify this amount by referring to a spontaneous and non-expert approximation by Father O'Reilly (who did not deal directly with the income or expenses of the performances) as the "stipulation" as to profits against which any award of statutory damages should be compared.

In the Superstar action the court below granted a permanent injunction and damages in the amount of \$22,800.00 for defendants' performances of the rock opera, Superstar, and \$4,700.00 in attorney's fees. Defendants appeal from that portion of the final judgment which granted damages for infringement of six (6) substantially identical copyrights in the unified rock opera, rather than granting damages for the unauthorized use of the overall copyright on each and every occasion Superstar was performed.

TOMMY ACTION

Plaintiffs in this action, represented by same counsel, sued defendants for infringement by unauthorized public performance of a dramatico-musical work entitled TOMMY. Relying on its findings in the Superstar action, the court below granted a preliminary injunction against defendants, which was affirmed by this Court (App., 24).

Plaintiffs thereupon moved for summary judgment granting a permanent injunction and statutory damages in the amount of \$13,500.00 for an alleged two performances of the rock opera, Tommy. This demand amounts to an incredible \$6,750.00 per performance of Tommy, even though plaintiffs made no attempt to prove defendants' profits or plaintiffs' damages, and relied solely on the statutory damage provisions of the Copyright Law, 17 U.S.C. § 101(b) (1970). Plaintiffs claimed twenty-seven (27) substantially identical copyrights in the unified rock opera, Tommy; namely, one copyright in the overall dramatico-musical work (App., 55), and twenty-six (26) separate copyrights in each of the individual song portions of the rock opera (App., 56-58), all of the copyright applications of which indicated that the compositions were "in folio entitled: Tommy-The Who (a Rock Opera)." Moreover, two of these twenty-six separate copyrights are duplicative; namely,

"Pinball Wizard," which has two copyrights, numbered respectively, Eu 190526, April 3, 1969, and Ep 259150, Aug. 4, 1969; and "See Me, Feel Me," Ep 279648, Nov. 16, 1970, which is part of the composition, "We're Not Gonna Take It," Ep 261487, Aug. 4, 1969. Furthermore, no proof was presented that there is a separate musical composition [as opposed to a dramatico-musical work] entitled "Tommy," Ep 261465, Aug. 1, 1969, as plaintiffs allege, or that defendants ever performed this composition as part of the rock opera.

Plaintiffs sought the statutory minimum award [\$250.00] multiplied by twenty-seven (27) copyrights (twenty-six of which provide duplicate coverage), multiplied by the alleged two performances.

The lower court granted a permanent injunction and damages in the amount of \$2700.00 for defendants' two performances of the rock opera, Tommy, and \$800.00 in attorney's fees. Defendants appeal from that portion of the final judgment which granted damages for infringement of twenty-seven substantially identical copyrights in the unified rock opera, rather than granting damages for the unauthorized use of the overall dramatico-musical work on each occasion Tommy was performed.

ARGUMENT

POINT I

THE SETTLED RULE THAT UNITED
STATES COPYRIGHT LAW HAS NO
EXTRATERRITORIAL EFFECT IS APPLICABLE

Plaintiffs concede that it is settled law in this Court that copyright laws have no extraterritorial effect, Capitol Records, Inc. v. Mercury Records Corp., 221 F.2d 657, 662 (2d Cir. 1955), but nevertheless contend that the activities of defendants herein come within the narrow limitations of two cases, Sheldon v. Metro-Goldwyn Pictures Corp., 106 F.2d 45 (2d Cir. 1939), aff'd 309 U.S. 390 (1940), and Famous Music Corp. v. Seeco Records, Inc., 201 F. Supp. 560 (S.D.N.Y. 1961).

In Sheldon negatives of an infringing motion picture were shipped abroad for reproduction and exhibition, and in Famous tape recordings of musical works were shipped to foreign countries for use in the manufacture of recordings. Neither of these cases in any way addresses the issue of Section 101(b) "in lieu" statutory damages. Sheldon deals with an accounting for profits, while in Famous the court awarded damages at three times the royalty rate, based upon the provisions of 17 U.S.C. § 1(e).

Moreover, both Sheldon and Famous are concerned with the mechanical production and reproduction of tangible things, namely film negatives and tape recordings, respectively. In this case we are concerned with the live, on-stage dramatic

performances of musicians and performers, whose manner and content of on-stage delivery necessarily varies from performance to performance. Plaintiffs claim (at page 31 of their brief) that defendants "assembled and arranged in the United States all of the necessary elements for the performance in Canada, and then travelled to Canada to complete the performances." Where is their proof for this contention? What specific "acts" in the United States have plaintiffs pointed out as evidence of infringement? If there are such "acts," why have plaintiffs failed to sue on these "acts" or "performances"?

The answers to the foregoing questions are evident. Plaintiffs know that if they sued on these alleged "acts" they would fall far short of the standard of proof and specificity required to sustain such an action. In fact, plaintiffs have failed to offer even a scintilla of evidence of any concrete "acts" which took place in the United States. The vague "acts" referred to by plaintiffs could just as easily have taken place in Canada as in the United States (if they occurred at all).

It would seem that the appropriate manner of redressing any harm caused by allegedly infringing Canadian performances would be, rather than attempting to sustain a convoluted theory of accountability in disregard of settled law, Nimmer, Copyright §§ 65.61, 156 and American Code Co. v. Bensinger, 282 F. 829, 833 (2d Cir. 1922), to sue in Canada.

Remarkably, that is precisely what plaintiffs did! In early 1972 (even before the instant suits were filed) the Canadian affiliates of plaintiffs filed suit against defendants and are currently prosecuting this action. Thus, plaintiffs are demanding that this Court grant "in lieu" damages for the same Canadian performances which are the basis of yet another suit in Canada. This is unmitigated greed, pure and simple--there is no other way to describe it.

Defendants respectfully suggest that this Court should not sanction overreaching of this nature, but should instead refuse on both legal and equitable grounds to allow the inclusion of the Canadian performances.

POINT II

IN CASES INVOLVING AN AWARD OF
STATUTORY DAMAGES UNDER § 101(b)
OF THE COPYRIGHT ACT (17 U.S.C.
§ 101(b)), COURTS ARE NOT
COMPELLED, SIMPLY BECAUSE
MULTIPLE INFRINGEMENTS ARE IN-
VOLVED, TO MECHANICALLY AWARD
MORE THAN THEY DETERMINE TO BE
REASONABLE OR JUST

Those few cases which squarely confront the "multiple infringement" issue [i.e., where a copyright is infringed in successive or separate transactions] have refused to mechanically apply the so-called formula of multiplying the minimum statutory award by the alleged number of infringe-

ments, where to do so would result in an excessive or unjust award. See Advertisers Exchange v. Hinkley, 199 F.2d 313 (8th Cir. 1952), cert. denied, 344 U.S. 921 (1953). See also Shapiro, Bernstein & Co. v. Bleeker, 224 F. Supp. 595 (S.D. Cal. 1963), aff'd in part [rev'd on the issue of attorney's fees] sub nom. Shapiro, Bernstein & Co. v. 4636 Vermont Ave., Inc., 367 F.2d 236 (9th Cir. 1966). The Register of Copyrights, commenting on this issue in light of the present statute and the proposed revision thereof, emphatically stated:

"We believe that the courts should, as they do now, have discretion to assess statutory damages in any sum within the range between the minimum and maximum. In exercising this discretion the courts may take into account the number of works infringed, the number of infringing acts, the size of the audience reached by the infringements, etc. But in no case should the courts be compelled, because multiple infringements are involved, to award more than they consider reasonable." Report of the Register of Copyrights on the General Revision of the United States Copyright Law at 105 (87 Cong., 1st Sess. 1961) (emphasis added).

In the instant case the court below applied these principles in reaching its determination regarding the reasonableness and justness of its award.

The court below denied plaintiffs' application to in-

crease the amount of statutory "in lieu" damages, citing Advertisers Exchange v. Hinkley and Shapiro, Bernstein & Co. v. Bleeker, supra. Despite the assertions of counsel for plaintiffs to the contrary, the reliance of the court below on Shapiro was not "clearly misplaced." As stated above, Shapiro was explicitly reversed only on the issue of attorneys' fees.

Similarly, Advertisers Exchange was not, as plaintiffs' counsel erroneously asserts, "clearly overruled" by Wihtol v. Crow, 309 F.2d 777 (8th Cir. 1962). The Wihtol opinion does not even mention Advertisers Exchange, except in a footnote regarding an issue unrelated to the instant case. The two cases are also factually distinct in several aspects, the most important of which is that Wihtol can in no way be deemed a "multiple infringement" case, whereas Advertisers Exchange quite clearly is. In fact, with the sole exception of The Robert Stigwood Group Ltd. v. Miami Jai-Alai, Inc., (unreported) S.D. Fla. 71-1772-Civ.-JLK, none of the cases cited by plaintiffs in Point I of their Argument presents a factual situation which is analagous to the cases at bar; i.e., multiple infringement where the mechanical application of the statutory damages section would tend to produce an unconscionable or unjust result. Of course, the holding in the Miami Jai-Alai case is unpersuasive because the motion for summary judgment was

unopposed by defendants and the court was therefore denied the countervailing authority cited in this appeal.

On the other hand, there are several interesting factual similarities between Advertisers Exchange and the cases on appeal before this court. For example, in Advertisers Exchange, the plaintiff sought to multiply his damages by suing on twenty-nine (29) counts, while in the present Tommy Action, plaintiffs have sued on twenty-seven "separate" copyrights covering the composite dramatico-musical rock opera, claiming each of them was infringed by each performance by defendants. For purposes of this lawsuit, they could have protected themselves equally well by suing only on one of the twenty-seven, namely, the "overall" class D (dramatico-musical) copyright which covers the entire rock opera, Tommy.

It must be evident to plaintiffs that the inclusion in the suit of the remaining twenty-six copyrights which cover the individual song portions of the rock opera would be inherently and necessarily duplicative since these copyrights obviously duplicate the coverage of the "overall" copyright. In fact, it is a blatant attempt to unjustly multiply statutory "in lieu" damages by "chopping up" the rock opera, Tommy, into twenty-six separate parts. This sounds suspiciously like the attempt on the part of plaintiff's counsel in Advertisers Exchange to "magnify

and inflate 'in lieu' damages by splitting the bill of complaint up into 29 counts." 199 F.2d at 316.

Contrary to the impression created by plaintiffs in their brief, it is a rare court which has sustained demands for statutory damage awards well in excess of the maximum of \$5,000.00. On the contrary, courts have generally applied the "reasonable" test cited by the Register of Copyrights, *supra*. One author who, in 1960, submitted a report to the Congress on the proposed copyright revision indicated that a study of 850 copyright cases during a period from 1945-1957 revealed that only twelve involved claims for statutory damages in excess of \$5,000.00. Most of these were unsuccessfully prosecuted, and according to the study, "no instances are known of recovery much in excess of \$10,000.00." Brown, the Operation of the Damage Provisions of the Copyright Law, Study No. 23 of Copyright Law Revision, Subcomm. on Patents, Trademarks & Copyrights of the S. Comm. on the Judiciary 59, at 79-80 (Comm. Print 1960).

Although plaintiffs could have readily demonstrated defendants' "profits" under Section 101(b) merely by proving defendants' sales (which were stipulated), plaintiffs instead chose to limit their total recovery to that permitted under the statutory damage provision of the Copyright Act. However, they in effect assert that under

said provision the hands of the court are tied, and that this Court must mechanically grant their demands for a grand total of \$103,500.00 in "minimum" statutory damages.

Following plaintiffs' logic, just one unauthorized public performance of the rock opera, Tommy, before either a very large or a very small audience (it doesn't matter which), would result in a mandatory damage award ranging from \$6,750.00 to \$135,000.00 under the mechanical minimum-maximum rule incessantly urged upon this Court by plaintiffs! These incredible figures are computed by multiplying the \$250.00-\$5,000.00 statutory range by the twenty-seven separate copyrights claimed by plaintiffs.

Following plaintiffs' logic one step further, assuming arguendo that defendants performed Tommy on sixty instead of two separate occasions, and Superstar only twice instead of sixty times (as claimed by plaintiffs), the minimum statutory damages to which plaintiffs would be "automatically" entitled in the Tommy Action alone would amount to the incredible total of \$405,000.00!

Moreover, plaintiffs argue that this result is inexorably forced upon the court by plaintiffs' simple act of choosing to elect statutory damages rather than to prove profits and damages. Defendants respectfully submit that plaintiffs' contentions, if accepted by this Court, will totally subvert the purpose of the statutory damages pro-

vision in the Copyright Act, which was intended to provide some recourse for a copyright owner who was unable to prove his damages or defendant's profits. However, "[t]he copyright statutes ought to be reasonably construed with a view to effecting the purposes intended by Congress. They ought not to be unduly extended by judicial construction to include privileges not intended to be conferred"

Bobbs-Merrill Co. v. Straus, 210 U.S. 339, 346 (1908)

(emphasis added).

Plaintiffs' argument that the court is not permitted to arrive at a reasonable and just result under the statutory damages provision of the present copyright statute is logically unsound and historically inaccurate. The statute does not preclude the exercise of discretion, and courts which have been confronted with cases involving a "multiple infringement" issue similar to the one before this Court have insisted on their right to exercise discretion in order to prevent an unjust, unreasonable and unconscionable result.

DEFENDANTS-CROSS-APPELLANTS' MAIN BRIEF

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

In an action for copyright infringement by a single performance, may a court which has awarded damages for infringement of a copyright on a unified dramatico-musical work multiply such award by granting damages for infringement of additional copyrights on song portions inherently a part of said unified dramatico-musical work?

PRELIMINARY STATEMENT

The consolidated appeals are from two amended final judgments entered in the United States District Court for the District of Connecticut, pursuant to rulings of the Honorable Robert C. Zampano.

Defendants hereby incorporate by reference herein the Statement of the Cases commencing on page 2 of their Reply Brief, supra, and this Court is respectfully referred thereto for a narration of the facts and circumstances pertinent to this appeal.

ARGUMENT

IN AN ACTION FOR COPYRIGHT IN-
FRINGEMENT BY A SINGLE PERFORM-
ANCE, DAMAGES AWARDED FOR
INFRINGEMENT OF A COPYRIGHT ON
A UNIFIED DRAMATICO-MUSICAL
WORK SHOULD NOT BE MULTIPLIED
BY GRANTING DAMAGES FOR IN-
FRINGEMENT OF ADDITIONAL
COPYRIGHTS ON SONG PORTIONS
INHERENTLY A PART OF SAID
UNIFIED DRAMATICO-MUSICAL WORK.

Defendants respectfully submit that the court below erroneously and uncritically accepted plaintiffs' assertion that the alleged infringement involved "the unauthorized use of six separately copyrighted works in public performances of the rock opera entitled 'JESUS CHRIS' SUPERSTAR'" (App., 44) and "the unauthorized use of twenty-seven separately copyrighted works in public performances of the Rock Opera entitled 'TOMMY'" (App., 76). The court below cited no authority whatsoever in support of its unfounded adoption of plaintiffs' position, nor did plaintiffs cite a single case in support of their assertion. Evidently there is no precedent which supports plaintiffs' contention.

Given the fact that plaintiffs have covered each of the composite rock operas, Superstar and Tommy, with an "overall" copyright, should the plaintiffs be allowed to multiply the damages to be paid by defendants in these cases merely

by subdividing their unified works into many song portions or segments and copyrighting each? Defendants contend that the answer should be most emphatically not! It is the entire rock opera which the public came to hear in each case, not individual songs, song portions or even a disjointed group of songs. It was the combination of music and story line, and the performance thereof, which attracted the audiences.

The case law in this area amply supports defendants' contention that the damages award should be based upon the "overall" copyright which was infringed by each performance of the respective rock operas. In Sche'llberg v. Empringham, 36 F.2d 991 (S.D.N.Y. 1929), it was held that although three different copyrights were infringed by defendant, the damages would not be multiplied by three because the copyrights covered, in essence, the same subject matter.

Similarly, in Advertisers Exchange v. Hinkley, 199 F.2d 313 (8th Cir. 1952), cert. denied, 344 U.S. 921 (1953), plaintiff requested over \$90,000.00 for twenty-nine infringements in a newspaper with a daily circulation of 3,261. The court was not misled by plaintiff's obvious attempt to inflate damages and multiply counts of infringement, and held that only one copyright was infringed in each case.

In an analogous case, Harry Alter Co. v. A.E. Borden Co., 121 F. Supp. 941 (D. Mass. 1954), plaintiff sued for

sixty-seven separate infringements of copyrighted catalogues by virtue of defendant's publication of three catalogues. The court held that there were only two significant infringements, and awarded damages accordingly, reasoning that to accept plaintiffs' argument would "multiply the number of infringements far beyond the actual extent of wrongdoing." *Id.* at 946.

A similar result was reached in Shapiro, Bernstein & Co. v. Bleeker, 224 F. Supp. 595 (S.D. Cal. 1963), *aff'd* [award of attorney's fees reversed] sub nom. Shapiro, Bernstein & Co. v. 4636 S. Vermont Ave., Inc., 357 F.2d 236 (9th Cir. 1966), wherein plaintiff sued for infringement of twelve copyrights by virtue of defendant's publication of a musical "fake book" containing 1000 songs. In denying plaintiff's motion for summary judgment, the court reasoned that to award the \$250.00 statutory minimum for each copyrighted song appropriated by defendant would be an unjust result.

The facts in this appeal suggest even more strongly than the above-cited cases that only one copyright infringement per performance should be found by this Court. Both *Superstar* and *Tommy* are composite dramatico-musical works, each of which is covered by an "overall" class D (dramatico-musical) copyright. Each overall copyright inherently covers its component parts or song portions. Therefore, it would be both unreasonable and unjust to allow plaintiffs

to recover for alleged infringement of both the composite, overall copyright covering the entire rock opera, and those copyrights which give duplicate coverage for each and every song portion included therein, as in the case of Tommy. Likewise, this reasoning applies to the copyrights in Superstar, since once again a composite work covered by an overall copyright is involved.

The foregoing contentions are supported by Professor Nimmer, who is in accord with defendants' view that statutory damages are not to be multiplied by the number of copyrights when the work actually performed comes under a single copyright. He says:

"If the defendant's infringing work copies from several different copyrighted works owned by the plaintiff, the applicable minimum damages will be multiplied by the number of such copyrights which have been infringed. This is to be contrasted with the situation where defendant's work copies various separate portions or passages of plaintiff's work, but all of such portions are protected under a single copyright. In such circumstances the minimum damages will not be multiplied by reason of the several separately copied passages." Nimmer on Copyright at 686-87.

Of course, it is clear and unequivocal statutory law that the dramatico-musical copyright protects every composition within it. 17 U.S.C. § 3 (1970); see 1 Nimmer on Copyright at 70-71. The pertinent portion of the Copyright Statute § 3 states:

"The copyright provided by this title shall protect all the copyrightable component parts of the work copyrighted. . . . The copyright upon composite works or periodicals shall give to the proprietor thereof all the rights in respect thereto which he would have if each part were individually copyrighted under this title." 17 U.S.C. § 3 (1970).

Thus, the additional copyrights on song portions or librettos or scores, etc., are superfluous for purposes of this suit. Plaintiffs could have obtained all the relief they needed here by simply suing on one copyright covering the entire opera. Their suits on a total of thirty-three copyrights covering two rock operas, Superstar and Tommy, thirty-one of which are redundant, is an obvious attempt to misrepresent the true damages to which plaintiffs are entitled.

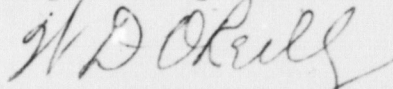
Where there is an overall dramatico-musical copyright covering the rock opera, the inescapable conclusion must be that defendants should be liable at most for the infringement of one copyright per performance, not twenty-seven or six, and thus are not additionally liable for infringement of the individual song portions or other components of the composite work. To hold otherwise would be contrary to public policy in that it would allow greedy owners of composite works to sub-divide their works into separate entities ad infinitum, and thus multiply unjustly the

damages they might claim against one performing the composite work. Furthermore, to hold otherwise would encourage the sub-division of copyrightable works and multiple registration of such sub-divisions, and thereby burden the United States Copyright Office with useless and wasteful work, and the taxpayer with needless expense.

CONCLUSION

It is respectfully submitted that the respective amended final judgments should be further amended (a) to award total damages in the amount of \$3,800.00 in the Superstar Action, and (b) to award total damages in the amount of \$100.00 in the Tommy Action.

Respectfully submitted,



William D. O'Reilly
Attorney for Defendants-
Appellees-Cross-Appellants

APPENDIX 'A'

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COPYRIGHT LAW OF THE UNITED STATES

- § 112. Injunctions; service and enforcement.
- § 113. Transmission of certified copies of papers for enforcement of injunction by other court.
- § 114. Review of orders, judgments, or decrees.
- § 115. Limitations.
- § 116. Costs; attorney's fees.

§ 101. INFRINGEMENT.—If any person shall infringe the copyright in any work protected under the copyright laws of the United States such person shall be liable:

(a) INJUNCTION.—To an injunction restraining such infringement;

(b) DAMAGES AND PROFITS; AMOUNT; OTHER REMEDIES.—To pay to the copyright proprietor such damages as the copyright proprietor may have suffered due to the infringement, as well as all the profits which the infringer shall have made from such infringement, and in proving profits the plaintiff shall be required to prove sales only, and the defendant shall be required to prove every element of cost which he claims, or in lieu of actual damages and profits, such damages as to the court shall appear to be just, and in assessing such damages the court may, in its discretion, allow the amounts as hereinafter stated, but in case of a newspaper reproduction of a copyrighted photograph, such damages shall not exceed the sum of \$200 nor be less than the sum of \$50, and in the case of the infringement of an undramatized or non-dramatic work by means of motion pictures, where the infringer shall show that he was not aware that he was infringing, and that such infringement could not have been reasonably foreseen, such damages shall not exceed the sum of \$100; and in the case of an infringement of a copyrighted dramatic or dramatico-musical work by a maker of motion pictures and his agencies for distribution thereof to exhibitors, where such infringer shows that he was not aware that he was infringing a copyrighted work, and that such infringements could not reasonably have been foreseen, the entire sum of such damages recoverable by the copyright proprietor from such infringing maker and his agencies for the distribution to exhibitors of such infringing motion picture shall not exceed the sum of \$5,000 nor be less than \$250, and such damages shall in no other case exceed the sum of \$5,000 nor be less than the sum of \$250, and shall not be regarded as a penalty. But the foregoing exceptions shall not deprive the copyright proprietor of any other remedy given him under this law, nor shall the limitation as to the amount of recovery apply to infringements occurring after the actual notice to a defendant, either by service of process in a suit or other written notice served upon him.

First. In the case of a painting, statue, or sculpture, \$10 for every infringing copy made or sold by or found in the possession of the infringer or his agents or employees;

Second. In the case of any work enumerated in section 5 of this title, except a painting, statue, or sculpture, \$1 for every infringing copy made or sold by or found in the possession of the infringer or his agents or employees;

Third. In the case of a lecture, sermon, or address, \$50 for every infringing delivery;

Fourth. In the case of a dramatic or dramatico-musical or a choral or orchestral composition, \$100 for the first and \$50 for every subsequent infringing performance; in the case of other musical compositions \$10 for every infringing performance;

(c) IMPOUNDING DURING ACTION.—To deliver up on oath, to be impounded during the pendency of the action, upon such terms and conditions as the court may prescribe, all articles alleged to infringe a copyright;

(d) DESTRUCTION OF INFRINGING COPIES AND PLATES.—To deliver up on oath for destruction all the infringing copies or devices, as well as all plates, molds, matrices, or other means for making such infringing copies as the court may order.

(e)¹ INTERCHANGEABLE PARTS FOR USE IN MECHANICAL MUSIC-PRODUCING MACHINES.—Interchangeable parts, such as discs or tapes for use in mechanical music-producing machines adapted to reproduce copyrighted musical works, shall be considered copies of the copyrighted musical works which they serve to reproduce mechanically for the purposes of this section 101 and sections 106 and 109 of this title, and the unauthorized manufacture, use, or sale of such interchangeable parts shall constitute an infringement of the copyrighted work rendering the infringer liable in accordance with all provisions of this title dealing with infringements of copyright and, in a case of willful infringement for profit, to criminal prosecution pursuant to section 104 of this title. Whenever any person, in the absence of a license agreement, intends to use a copyrighted musical composition upon the parts of instruments serving to reproduce mechanically the musical work, relying upon the compulsory license provision of this title, he shall serve notice of such intention, by registered mail, upon the copyright proprietor at his last address disclosed by the records of the copyright office, sending to the copyright office a duplicate of such notice.

[(f) See footnote 1, page 15, *supra*.]

[§ 102. See footnote 1, page 15, *supra*.]

[§ 103. See footnote 1, page 15, *supra*.]

¹ The former section 101(e) was deleted in its entirety and the present language was substituted by the Act of October 15, 1971, Pub. L. 92-140, 85 Stat. 391, effective immediately upon enactment.